IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division

UNITED STATES OF AMERICA

v. Case No. 8:03-CR-77-T-30TBM

SAMI AMIN AL-ARIAN, et al.

Defendants.

SAMI AMIN AL-ARIAN'S REPLY TO GOVERNMENT'S RESPONSE TO HIS MOTION TO SUPPRESS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW the Accused, Dr. Sami Amin Al-Arian, by counsel, and files this reply to the Government's response to his motion to suppress all evidence seized by the United States Government pursuant to searches conducted on November 20 and 21, 1995, December 19, 1995 and February 20, 2003.

I. Destruction of Documents

As should be abundantly clear from Dr. Al-Arian's 47-page Motion to Suppress and the Government's 48-page response, the propriety of the searches conducted in this case, from the initial probable cause determination to the ultimate carrying out of the search warrants, is hotly contested. While the Government dismissively notes that the destruction of the search warrants and warrant applications was "unfortunate and inadvertent," the Government fails to acknowledge the Constitutional ramifications to Dr. Al-Arian. Instead, the Government apparently contends that Dr. Al-Arian has no standing to complain about the reconstruction process because any reconstruction of the documents was undertaken *for his benefit*. In other words, the Government takes the position that even though Dr. Al-Arian had nothing whatsoever to do with the documents' destruction, to the extent he wishes to challenge the searches and therefore by necessity must be able to examine those documents, any efforts at reconstructing

them is being undertaken as a "favor" to him and he has no room to complain about the accuracy of any such reconstruction. This illogical and patently offensive position is, predictably, not supported by citation to any case law and is belied by common sense.

Inexplicably, the Government further asserts that that Dr. Al-Arian "does not even claim the file has not been reconstructed accurately." Once again, the Government's argument is nonsensical and unsupported. The entire thrust of Dr. Al-Arian's complaint on this issue is that the method employed by the Court is not conducive to an accurate reconstruction of the destroyed documents. The Court's procedure relied on the nine-year-old memories of Special Agents West and Carmody, and the nine-year-old memory of the Magistrate. Obviously, if Dr. Al-Arian were able to point to the exact inaccuracies in the reconstructed documents, he would know what was in the original documents. And that, of course, is the entire problem and why this issue is being argued in the first place. The bottom line is that the procedure the Court used to reconstruct the documents is unreliable and naturally lends itself to inaccuracy.

Regarding Dr. Al-Arian's requested remedy, the Government contends that suppressing the evidence seized during those searches is not an appropriate remedy for the documents' destruction because the "prime purpose" of the exclusionary rule is to deter police misconduct. (Doc. 841, P. 2). Predictably, other than simple "reconstruction of the file," the Government does not suggest what would be an appropriate remedy where the only accurate record of the search documents was destroyed through no fault of the defendant's.

To support its position that reconstruction of the destroyed files is the only appropriate remedy here, the Government cites United States v. Santarelli, 778 F. 2d 609 (11th Cir. 1985). The Government's reliance on Santarelli is wholly unavailing in the context of this case. The only mention of a missing affidavit in Santarelli is in a single footnote, wherein the court noted that the original warrant and supporting affidavit were not contained in the record because

"[a]pparently, these documents were lost prior to the suppression hearing. The parties, however, agree that the description in the text accurately reproduces the original warrant's language." Id. at 614 n. 8. The missing original warrant and affidavit were simply a non-issue in Santerrelli, as indeed the parties even stipulated to the accuracy of the reproductions. Here, the accuracy of the reconstructed search documents and the reconstruction process itself is precisely what Dr. Al-Arian challenges.

The Government's reliance on United States v. Lambert, 887 F.2d 1568 (11th Cir. 1989), is equally unavailing. The Lambert Court rejected the defendant's challenge to the validity of a search warrant based on a missing affidavit because "[t]he contents of the affidavit were easily established because duplicates of the affidavit had been made and executed, one of which had been filed to support a Complaint." Id. at 1572. Clearly, the same cannot be said in Dr. Al-Arian's case.

Finally, the Government contends "Dr. Al-Arian also does not articulate, and has never articulated, the exact nature of his objection to the Court's procedure." (Doc. 841, P. 3). To the contrary, Dr. Al-Arian noted in his opening brief that a better procedure might have been for the Court to appoint a Special Master to take testimony of the agents and Magistrate to determine the accuracy of any allegedly copied paperwork, particularly where the Magistrate who conducted the reconstruction process was as much a witness as the agents.

The destruction of the search documents in this case has significant Constitutional implications for Dr. Al-Arian's defense. The Government cannot avoid those implications by minimizing the documents' destruction or by relying on wholly unavailing caselaw. The Magistrate's reconstruction process in this case, particularly to the extent that defense counsel was not involved in the process, denied Dr. Al-Arian his rights under the Fifth and Sixth Amendments, and the materials seized pursuant to those documents should be suppressed.

II. Dr. Al-Arian Clearly Has Standing to Challenge the Searches of His Personal Offices and Storage Space Leased in His Name.

The Government contends that Dr. Al-Arian lacks standing to challenge the 1995 searches conducted of WISE and the People's Storage facility, and the 2003 search of his office at IAF in Tampa, Florida. The Government's position is belied by long-established Supreme Court precedent, and even by the cases the Government inexplicably cites in its own brief. Clearly, Dr. Al-Arian had a reasonable expectation of privacy in his offices and the public storage space leased in his name, and has standing to challenge the searches of each of these areas. "Fourth Amendment jurisprudence is now well-settled that protections from unreasonable searches and seizures do not depend 'upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." United States v. Abdullah, 162 F. 3d 897, 902 (6th Cir. 1998) (citing Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421 58 L.Ed.2d 387 (1978)).

A. Dr. Al-Arian has standing to challenge the search of his offices.

In the search warrant affidavit, WISE is described as an "office environment…containing file cabinets, desks and computer equipment…" (West Affidavit, November 17, 1995, P.11) Clearly, the affiant believed that Dr. Al-Arian maintained an office at WISE and had a close connection with the organization. As the Supreme Court has recognized, "It has long been settled that one has standing to object to a search of his office, as well as one of his home." Mancusi v. DeForte, 392 U.S. 364, 369, 20 L.Ed.2d 1154, 88 S.Ct. 2120 (1968); see also United States v. Higgins, 282 F.3d 1261, 1270 (10th Cir. 2002) (where defendant used abandoned and condemned building as a methamphetamine lab, he had no reasonable expectation of privacy in the premises; likewise, no reasonable expectation of privacy even if he were on the premises as a business invitee with permission from the owner to clean and repair the premises); United States v. Anderson, 154 F.3d 1225, 1230 (10th Cir. 1998) ("It is well established that an employee has a

reasonable expectation of privacy in his office. . . . Therefore, [defendant] clearly had standing to challenge the search of his office."); United States v. Leary, 846 F.2d 592 at 595 (10th Cir. 1988); United States v. Lefkowitz, 464, F. Supp. 227, 230 (C.D. Cal. 1979) (corporate officers had sufficient privacy interest in corporate office suite), aff'd 618 F.2d 1313 (9th Cir.), cert. denied 449 U.S. 824, 66 L.Ed. 2d 27, 101 S. Ct. 86 (1980); see also 4 W. LaFave, Search and Seizure § 11.3(d) (2d ed. 1987).

None of the cases the Government cites actually support its proposition that Dr. Al-Arian lacks standing to challenge the search of his offices. To the contrary, the Government's own cases actually reinforce the principle that one has a reasonable expectation of privacy in his personal office and therefore has standing to object to its search. See, e.g., Minnesota v. Carter, 525 U.S. 83, 86, 90, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (defendants lacked standing to object to the search of an apartment where they "were not overnight social guests but temporary out-of-state visitors" who were "essentially present for a business transaction and were only in the home a matter of hours"); United States v. Daily, 921 F. 2d 994, 1002 (10th Cir. 1990) (defendant lacked a reasonable expectation of privacy in the offices of a money brokerage fund where neither was an officer, employee, or shareholder of the fund and where they both "attempted to distance themselves from [the fund] in more than one instance"); United States v. Britt, 508 F.2d 1052, 1054 (5th Cir. 1975) (no standing to challenge search of corporate premises where there was no evidence defendant spent any time working in the storage area searched, or any other space in the building, or that any of the material seized was taken from the defendant's personal desk or briefcase or files, where defendant had been in the hospital during and several months prior to the search, and where nothing in the record suggested the search was directed at him rather than corporate activity generally).

B. Dr. Al-Arian has standing to challenge the search of his storage space.

Likewise, Dr. Al-Arian has standing to challenge the search of his storage locker in the People's Storage facility. The Supreme Court has long recognized that a person has a reasonable expectation of privacy in his own storage locker. United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 3306 n. 6, 82 L.Ed.2d 530 (1984); see also United States v. Johns, 851 F.2d 1131, 1135-36 (9th Cir. 1988) (defendant had reasonable expectation of privacy in storage unit and thus standing to challenge search even where his name was not on the rental agreement, where he had ongoing arrangement with co-defendant for control of the unit). The Government does not cite any support it its response suggesting otherwise. Moreoever, the original affidavit in the search of the storage locker expressly identified Dr. Al-Arian as the owner of the storage locker.

> On November 29, 1995, your affiant spoke with Peter Tsokos, General Manager, People's Storage, 12225 North 56th Street, Tampa, Florida, 33617, confirming that on June 30, 1993, Sami Al-Arian, 5207 East 127th Avenue, Tampa, Florida…who is employed as a professor at the University of South Florida, rented storage space at Peoples Storage, 12225 North 56th street, Tampa, Florida. (Agent M. Barry Carmody Affidavit, December 19, 1997(sic); Page 4.)

In a subsequent affidavit, Agent Carmody again identifies Dr. Al-Arian as the locker's owner.

> Further investigation revealed that the storage unit had been rented by Sami Al-Arian…[a] search warrant was issued for Al-Arian's storage unit at Peoples Storage, Tampa, Florida. (Agent Carmody Affidavit of May 14, 2004, paragraphs 5-6)

III. The FBI Did Not Have Valid Consent To Search Dr. Al-Arian's Office at 5901 E. 130 Ave.

The Government contends that the 2003 search of Dr. Al-Arian's Office at 5901 E. 130 Avenue in Tampa, Florida was proper because law enforcement officials obtained "written permission from a responsible IAF official to search" the offices. The Government further contends that the search was a lawful consent search based on the assertions contained in a memorandum prepared by an FBI agent, which address the "circumstances surrounding the obtaining of written permission." Significantly, there is no information whatsoever that contends

permission to search was given knowingly or voluntarily. The only information in the memorandum relevant to permission obtained by the FBI agents was the bald fact that "[a]t approximately 7:30am, BIUK signed a form indicating his consent" and that 45 minutes later he signed the same form again "to reflect his approval of additional descriptive information added" to the form.

Even if there was information relating to the knowing and voluntary nature of the purported consent, this Court must still hold a hearing on the issue of consent, as the Government's conclusory reliance on the FBI agent's memorandum is insufficient to establish valid consent where, as here, it is challenged. The Supreme Court has long held that "the prosecution's 'burden of proving that the consent was, in fact, freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority.'" United States v. Mendenhall, 446 U.S. 544, (1980) (citing Bumper v. North Carolina, 391 U.S. 543, 548-549, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968)); see also United States. v. Blake, 888 F.2d 795, 798 (11th Cir. 1989) ("The government bears the burden of proving both the existence of consent and that the consent was not a function of acquiescence to a claim of lawful authority but rather was given freely and voluntarily.") (citing United States v. Massell, 823 F.2d 1503, 1507 (11th Cir. 1987)).

In this case, the supposed consent Mr. Biuk gave the FBI is highly suspect, in large part because he was never told that Dr. Al-Arian had already *refused* the FBI's request for the search.[1] Moreover, there is absolutely no information in the FBI agent's "memorandum" to indicate that the consent was voluntary or in any way describing the circumstances surrounding the securing of Mr.Biuk's consent. Determining whether consent to a search is voluntary is a

[1] Dr. Al-Arian refused to give consent to the search and refused to waive any of his rights. Please see Government Discovery Index, 1A Files, FBI Form re: Waiver of Rights taken by S.A. Gallagher, Dated 2/20/03 at 7:26 a.m. **before** any "consent" given by BIUK.

"question of fact to be determined by the totality of the circumstances." Blake, 888 F.2d at 798 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 249-50, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854 (1973)). At a minimum, the Court must hold an evidentiary hearing to determine whether valid consent was obtained.

IV. Search Warrant Standard of Review

In this section of the Government's response, the Government, with an eye for picking only those portions of cases that support its view, discusses the great deference due to a magistrate's finding of probable cause. However, the case law makes clear that such deference is not due where the affidavit consists of merely the conclusions of the affiant.

> This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. *See Aguilar v. Texas*, [378 U.S. 108] Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than commonsense, manner."

United States v. Ventresca, 380 U.S. 102, 108 (1965).

In addressing nearly the same issue, the Court in Gates held:

> A sworn statement of an affiant that "he has cause to suspect and does believe" that liquor illegally brought into the United States is located on certain premises will not do. *Nathanson v. United States*, 290 U.S. 41 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "[affiants] have received reliable information from a credible person and do believe" that heroin is stored in a home, is likewise inadequate. *Aguilar v. Texas*, 378 U.S. 108 (1964). As in *Nathanson*, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

Illinois v. Gates, 462 U.S. 213, 231 (1983).

The Courts have even given a name to these affidavits that contain only conclusions and lack the facts and circumstances underlying the affiant's claims: "However, an affidavit that contains only conclusions and 'lack[s] the facts and circumstances from which a magistrate can independently determine probable cause' is considered 'bare bones' and cannot be the basis of an objectively reasonable good-faith reliance by an officer. We review *de novo* whether the good-faith exception to the exclusionary rule applies." United States v. Marmolejo, 89 F. 3d 1185, 1198 (5th Circuit 1996.)

V. The Search Warrants in this Case Were Merely Pretextual.

Perhaps the most striking revelation of the Government's response appears in footnote 5, where the Government announces that this was a terrorism investigation. If one simply reads the William West Affidavit one would have been lead to believe that the search in question involved the search for evidence of:

> false statements to a department of the United States, in violation of Title 18, United States Code, section 1001; false statements relating to naturalization, citizenship or registry of aliens, in violation of Title 18, United States Code, section 1015; the unlawful procurement of citizenship or naturalization, in violation of title 18, United States Code, Section 1425; fraud and misuse of visas, permits, and other documents, in violation of Title 18, United States Code, Section 1546; and aiding or assisting certain aliens to enter, in violation of Title 8, United States Code, Section 1327. (Page 2, West affidavit November 17, 1995)

A search supporting a terrorism investigation is obviously far broader than that described by the statutory authority claimed in the affidavit. Thus, the Government never intended that the search it was going to conduct be bound by the statutory authority asserted in the affidavit. It was looking for whatever evidence the agents thought was evidence of terrorism.

The implications of the foregoing should be clear. First, the magistrate was not informed that the purpose of the search was to obtain evidence of terrorism. Thus, the magistrate was unable to establish any limitations on what was meant by evidence of terrorism and therefore the

agents were left to their own devices as to what was to be seized. Second, all the evidence of terrorism expressed in the affidavit relies entirely on the speculation and conclusions of Agent West, newspaper accounts, and the musings of unknown so-called terrorism experts whose experience is expressed in the affidavit only by the conclusory statements of Agent West.

While Agent West may have demonstrated that Dr. Al-Arian made a false statement on his application for naturalization with respect to ICP and WISE in violation of Title 18 U.S.C. §1425, nothing with respect to this violation authorized the search conducted here. The affidavit neither asserts nor alleges that there was any fraud or misrepresentation with respect to the entry papers of either Shallah or Nafi but concludes, because of newspaper articles and the statement of a "reliable F.B.I. cooperating witness", that Shallah and Nafi were excludable aliens at the time their petitions were filed and that Dr. Al-Arian knew it. Thus the reliance on newspaper articles and reliable informants, without more, are offered to support the claim that Nafi and Shallah were excludable at the time of their petitions.

With respect to the reliable informants, the only basis upon which the informants can be claimed to be reliable is the unsupported conclusion of Agent West. There simply is no evidence offered that either Shallah or Nafi were excludable at the time of their petitions. The purpose of including all the unsupported evidence of newspaper articles and the informant information was to extend the search far beyond the parameters that the statutes mentioned in the affidavit permitted.

As previously discussed in the accused's initial motion to suppress, the 1995 affidavit is a series of conclusions made entirely by the affiant without any underlying support posing as probable cause. The affidavit relies on such conclusory language as "known terrorist, interviews with an unnamed Islamic Jihad official lifted from a Jordanian newspaper," allegedly reliable informants with no information from which the magistrate can make a judgment about either the

informant's reliability or veracity, discussions with so-called terrorist experts who are unnamed and who's alleged expertise is not described. The agent's primary reliance for the notion that WISE and IAF constitute fronts is a series of newspaper articles. Interestingly enough, the newspapers from which these articles emanated are not named. Thus the magistrate is not even given enough information in the affidavit so he can read the articles and make his own determination about the veracity of the news articles.

Supreme Court Justice Antonin Scalia recently has had an opportunity to comment on the veracity of news reports. In addressing a motion to recuse filed by the Sierra Club in Cheney v. United States Dist. Court, -- U.S. --, 124 S.Ct. 1391, 158 L.Ed.2d 225 (2004), Justice Scalia noted that although he expected the motion to be "replete with citations of legal authority," instead the motion "consist[ed] almost entirely of reference to, and quotations from, newspaper editorials." Id. at 1398. He further recounted:

> The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right. The length of our hunting trip together was said to be several days (San Francisco Chronicle), four days (Boston Globe), or nine days (San Antonio Express-News). We spent about 48 hours together at the hunting camp. It was asserted that the Vice President and I "spent time alone in the rushes," "huddled together in a Louisiana marsh," where we had "plenty of time . . . to talk privately" (Los Angeles Times); that we "spent . . . quality time bonding together in a duck blind" (Atlanta Journal-Constitution); and that "[t] here is simply no reason to think these two did not discuss the pending case" (Buffalo News). As I have described, the Vice President and I were never in the same blind, [*21] and never discussed the case. (Washington officials know the rules, and know that discussing with judges pending cases--their own or anyone else's--is forbidden.) The Palm Beach Post stated that our "transportation was provided, appropriately, by an oil services company," and Newsday that a "private jet . . . whisked Scalia to Louisiana." The Vice President and I flew in a Government plane. The Cincinnati Enquirer said that "Scalia was Cheney's guest at a private duck-hunting camp in Louisiana." Cheney and I were Wallace Carline's guest. Various newspapers described Mr. Carline as "an energy company official" (Atlanta Journal-Constitution), an "oil industrialist," (Cincinnati Enquirer), an "oil company executive" (Contra Costa Times), an "oilman" (Minneapolis Star Tribune), and an "energy industry executive" (Washington Post). All of these descriptions are misleading.

Cheney, 124 S.Ct. at 1399-1400 (see also pp. 1392-94, wherein Justice Scalia sets forth the facts and chronology of his hunting trip).

The purpose of adding all of these conclusory allegations and the reliance on information that was unverifiable was to extend this search into areas that the agent had suspicions about but no probable cause. A search for additional evidence of fraud in Dr. Al-Arian's UISA application is indeed a limited and unexciting search. Particularly since the species of fraud that the agent was relying upon is that Dr. Al-Arian had failed to state his association with WISE and ICP limiting the scope of the search. The only way to have any authority to search WISE or ICP records beyond those that might have shown a relationship between Dr. Al-Arian and these organizations was to make the claim that they were fronts. All of the evidence that WISE or ICP were engaged in anything illegal were the musings of Agent West and his unknown and unnamed law enforcement comrades.

It is our belief that the statutory authority relied upon in the affidavit was merely a pretext by which the Government sought to search premises of the accused for general evidence of terrorism. As a result, the real boundaries of the searches here were established by the parameters of what the seizing agents thought was evidence of terrorism.

A. An Examination of Probable Cause with Respect to WISE in 1995.

The entire rationale offered for the search of WISE and ICP was Dr. Al-Arian's failure to list WISE and ICP as organizations that he had an affiliation with. Ramadan Shallah and Bashir Nafi worked there. Sami Al-Arian knew them and sponsored them to work at WISE. WISE co-sponsored conferences. People who were identified as terrorists in news accounts were among the people invited to conferences. WISE was never identified as committing one criminal act. Not one act of fraud was identified as having been committed by WISE or in its name. Not one person who had been admitted into the country as a result of WISE was identified as wrongfully

admitted. Not one lie or falsehood is identified as connected with any act undertaken by WISE. The H1 and B2 visa and renewal applications of both Nafi and Shallah were examined and despite all the creative energy expressed in Mr. West's affidavit, Agent West could identify absolutely nothing criminal in these documents. When all of these things failed, Mr. West resorted to unnamed "reliable informants" (reliable only because he said so) and to foreign news reports.

In another time and place we would describe Agent West's conduct as relying on rumor and innuendo. A similar examination of the information in the affidavit regarding ICP would result in a similar finding. Remarkably, the Government as much as concedes these issues, by not addressing them. The mentality of the Government with respect to the probable cause issue is best expressed in the Government's pleading regarding the following portion of the affidavit:

> Additionally the CW stated that, during the above mentioned conference that he/she attended Sami Al-Arian indicated to the attendees that the ICP and WISE provided support to various Palestinian political causes. The CW further stated that he/she had spoken to both Sami Al-Arian and Ramadan Abdullah Shallah and that they had admitted to the CW that the purpose was to provide United States based support for Palestinian political causes. (West Affidavit, Page 10).

In answering the claim that support for Palestinian political causes was entirely legal which provides no semblance of probable cause necessary to permit the kind of search undertaken here, the Government's answer starts "Given the other information in the affidavit the logical inference to be drawn from CW's statement was that Al-Arian and Shallah were actually referring to support for PIJ." (Doc. 841, Page 19.) There are many political causes at work with regard to Palestine. For instance there are refugee issues and there are issues of housing and medical care. Why the automatic reference to the PIJ? In any event, this informant did not say that the ICP or WISE had any connection to the PIJ. This is exactly the type of overreaching that resulted in the searches conducted in this case. The search here was an attempt to preempt what the agents suspected was a group of terrorists in our midst. While preemption

may have a place in the Game of Nations, the Fourth Amendment does not permit preemptive searches based on suspicions.

VI. Need for a Hearing

Where, as here, the execution of the search is challenged by an accused and where the allegation is that the agents exceeded the scope of the authority granted them by the warrant, a hearing to determine what the agents understood their authority to be is essential to making a reasonable determination of the agent's conduct. It was only as a result of a hearing that the judge in Heldt could write:

> On July 7, 1977, the day before the searches took place, various supervisory and legal personnel from the FBI's Los Angeles office, and others from the U.S. Attorney's office in Washington, conducted a briefing for the agents who had been selected to participate in the searches of Fifield Manor and the Cedars-Sinai Complex. At six a.m. on July 8, teams of agents entered both Fifield Manor and Cedars-Sinai to execute the search. The Fifield Manor search – the smaller of the two – covered a four-room area around defendant Henning Heldt's office on the sixth floor, his personal office, a large secretary's office, the office of his assistant (defendant Snider), and an adjoining but separated "penthouse room. Within this area the agents searched approximately eight fourdrawer [sic] file cabinets, one two-drawer file cabinet, five desks, three closets, and various piles of documents and papers. They also searched, but seized nothing from, and adjoining telex room. All told, the agents seized approximately 430 documents from Fifield Manor.

United States v. Heldt, 668 F.2d 1238, 1255 (D.C. Cir. 1981).

Despite the nature of the seizures involved in this case the Government cavalierly suggests that no hearing is necessary here. Both the searches in 2003 and 1995 resulted in the seizure of articles that were clearly beyond the scope authorized by the magistrate. Only a hearing can flesh out these issues. [2]

VII The Execution of the Search Warrants Exceeded the Scope of the Warrants[3]

[2] We are also seeking oral argument on all search and seizure issues.

[3] The Government has offered "plain view" as a potential explanation for some of the seizures here. Plain view is a recognized exception to the warrant requirement and as such the Government bears the burden of proving that the seizures here fit within that exception. In the instant case, the Government has made

Two questions must be resolved with respect to the execution of the search warrants in this case: (1) Was the warrant overbroad, and (2) whether the agents intended to be bound by the warrant. The Government seeks to extend the reach of the warrant by resort to the affidavit. However, the Government never even makes the claim that the executing officers had ever seen or discussed the affidavit much less possessed it at the time of the execution. The affidavit and warrant were under seal.[4] Clearly, Dr. and Mrs. Al-Arian never saw it.

> The fourth amendment serves to protect two distinct interests. First, the warrant requirement seeks to guarantee that any searches intruding upon an individual's privacy must be justified by probable cause, as determined by a "neutral and detached magistrate." Second, where probable cause is found and a warrant issues, the particularity requirement seeks to assure that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. As the Supreme Court stated decades ago, [t] he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. AS to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927).

United States v. Heldt, 668 F.2d 1238, 1256 (D.C. Cir. 1981) (internal citations omitted).

As the Third Circuit noted in Doe v. Groody, 361 F.3d 232 (3d Cir. 2004), it is "clearly established that unless a search warrant specifically incorporates an affidavit, the scope of the warrant may not be broadened by language in that affidavit." The court further explained that if the affidavit was not incorporated into the warrant, the affidavit may still be used to save a defective warrant in two categories of cases. The first category of cases involves an ambiguity

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no effort to state which items were seized as a result of the exception. Here the search included searches of closets and closed cabinets, all for evidence against the accused. Plain view will not support this search.

[4] Eight years after the search when counsel requested the affidavit, they were told by both the Court and U.S. Attorney's Office that the affidavit remained under seal. An unsealing order was even entered by the Magistrate. It is highly unlikely that the executing officers ever saw the affidavit.

or clerical error contained in the warrant that can be resolved by referencing the affidavit. See, e.g., United States v. Ortega-Jimenez, 232 F.3d 1325, 1329 (10th Cir.2000) (ambiguous term); United States v. Simpson, 152 F.3d 1241, 1248 (10th Cir.1998) (internal inconsistency in warrant). In such circumstances, "reliance on the affidavit … neither broadens nor shrinks the scope of the warrant, but merely rectifies a '[m]inor irregularit[y].'" Groody, 361 F.3d at 240 (citing United States v. Johnson, 690 F.2d at 65 n. 3 (quoting Ventresca, 380 U.S. at 108, 85 S.Ct. 741))).

The second type of case in which an unincorporated affidavit may cure a defective warrant is where the affidavit is particularized but the warrant is overbroad. See, e.g., United States v. Bianco, 998 F.2d 1112, 1116-17 (2d Cir. 1993); United States v. Towne, 997 F.2d 537, 547 n. 5 (9th Cir.1993) (discussing cases). "So long as the actual search is confined to the narrower scope of the affidavit, courts have sometimes allowed the unincorporated affidavit to 'cure' the warrant . . .or at least have treated the excessive elements of the warrant as harmless surplusage." Groody, 361 F.3d at 240 (citing United States v. Stefonek, 179 F.3d 1030, 1033-34 (7th Cir.1999)).

Here, the affidavits were not incorporated or referenced in the search warrants. Neither of the circumstances described above are present in this case, and therefore, the defective search warrants cannot be saved in the manner described in Groody. Because the warrants did not reference the affidavits, and because it is apparent that neither the officers executing the warrants nor Dr. Al-Arian or his wife saw the affidavits, the affidavits cannot operate to broaden the scope of the search warrants.

VIII. First Amendment Issues

The Government's treatment of the First Amendment issues raised by the searches in this case is interesting. An examination of the 21 categories of items to be seized with respect to the 1995 searches reveals that not one of the categories set forth in Attachment B supports the seizure of books. The closest of the 21 categories of Attachment B which would support the seizure of books is item number 12: "pamphlets, leaflets, booklets, and audiotapes related to WISE, ICP, Sami Al-Arian, Ramadan Abdullah Shallah, Basheer Nafi and Islamic Jihad." This was interpreted to permit the seizure of anything written in Arabic. Any book possessed by either Dr. Al-Arian, WISE or ICP, any book that discussed political issues in the Middle East, any book that discussed Islam, even a Koran, was seized. Thus what appears to be a limitation on the agent's seizing authority ultimately worked as an open invitation to seize all books at the homes and offices of the Accused.[5]

Likewise, the 2003 searches authorized the seizure of books or pamphlets that discussed the PIJ. This turned into a wholesale authority to seize any book t hat discussed Islam, Islamic ideology, or was on the premises. Ultimately this authority allowed the agents to believe they could even take the plaques from the Accused's walls that were awarded for civic involvement. Once again, the Government acted without limitation. The warrant specifies books that mention PIJ. This criteria, if observed at all with respect to First Amendment materials, was observed only in its breach.

It seems that only certain types of written materials are respectable enough to warrant First Amendment protections. The Government notes that if this were this an obscenity

[5] The Government attempts to make much of the fact that a translator was on the premises during the 1995 search. Yet the discovery index prepared for this case reveals that items are still listed as notes in Arabic. Clearly, the Government does not assert that every item that was seized during the 1995 search which was in Arabic was examined by the Arab speaking translator. Even more curious was that no translator was present during the 2003 search. The Government had previously invaded the Defendant's space in 1995. They knew much of what they would encounter was in a foreign language, yet they took no precaution in the 2003 search to determine the relevance of the seizures.

investigation, the materials seized might be subject to the First Amendment protection as expressed in Stanford. Books and papers that evidence political or religious thoughts, however, are not protected materials. In making that suggestion, the Government perverts the defense claim. The Government asserts that the defense has claimed that the First Amendment insulates the books and papers from seizure. This was not the defense's claim. All the defense claimed was that in as much as the materials the Government sought to seize were protected by the First Amendment, the requirements of the Fourth Amendment must be applied with scrupulous exactitude.

Both United States v. Brown, 49 F.3d 1162 (6th Cir. 1995) and United States v. Frisby, 79 F.3d 29 (6th Cir. 1996), cited by the Government, recognize that the defense is correct in that claim. In Brown and Frisby, the Court finds compliance with the scrupulous exactitude standard commanded by the First and Fourth Amendments.

> The publications and papers set forth in the search warrant affidavit are limited to those concerning the identification of targets of skinhead and Klan activities. Furthermore, in stating why those items are relevant to the crimes charged, the affidavit is far more specific than other warrants struck down on this ground. See Stanford v. Texas, 379 U.S. 476, 482, 13 L. Ed. 2d 431, 85 S.Ct. 506 (1965) (holding that warrant authorizing search of private home for *all* books, records and other materials relating to the Communist party was too broad); United States v. Apker, 705 F.2d 293 (8th Cir. 1983) (striking down warrants that sought only indicia of Hell's Angels membership), cert denied, 465 U.S. 1005 (1984).

Brown, 49 F.3d at 1169 (emphasis in original).

Clearly, the actual search warrants involved in both the 2003 and 1995 searches would not survive the scrupulous exactitude standard and are akin to those condemned in Stanford v. Texas, 379 U.S. at 485.

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Respectfully submitted,

_/s/ Linda Moreno___

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2005, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

_/s/ Linda Moreno__
Linda Moreno
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